SUPREME COURT OF THE UNITED STATES.

No. 266.

THE SWIFT AND COURTNEY AND BEECHER COMPANY, APPELLANT,

VS.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

	Original.	Print.
Amended petition (as substitute for original petition), filed May 6, 1879..	1	1
Demurrer to amended petition	6	3
Argument upon demurrer	7	3
Opinion of the court	8	3
Final judgment	10	5
Appeal	11	5
Certificate	12	5

1 In the Court of Claims.

THE SWIFT AND COURTNEY AND BEECHER Company
vs.
THE UNITED STATES.
} No. 11981.

I. *Amended petition.—Filed May* 6, 1879, *by leave of court as a substitute for the original petition filed January* 20, 1879.

Your petitioner, The Swift & Courtney & Beecher Company, respectfully represent that it is a corporation incorporated and organized in the year 1870, under and in accordance with the laws of the State of Connecticut.

That it was, on the 1st day of May, A. D. 1870, and since then continuously has been, the proprietor, manufacturer, and vendor of friction matches, of peculiar value, at various places in the United States, with one of its principal offices at Wilmington, in the State of Delaware.

That, as said proprietor and manufacturer, at the beginning of its said business it furnished to the Commissioner of Internal Revenue its own die for stamps, to be used especially for its own proprietary articles aforesaid. Petitioner further says that in the act of Congress of July 4, 1862, 12 Statutes, 477, it was enacted as follows: "That any proprietor or proprietors of articles named in Schedule C who shall furnish his or their own die or design for stamps, to be used especially for his or their own proprietary articles, shall be allowed the following discount, viz, on amount purchased at one time, if not less than
2 fifty nor more than five hundred dollars, five per centum on amount; over five hundred dollars, ten per centum." Petitioner says that friction matches were named in said Schedule C. Petitioner further says that the above was re-enacted March 3, 1863, 12 Statutes, 718, with the exception that the word "discount" was changed to "commissions," and that said enactment of 1863 was re-enacted June 30, 1864, 13 Statutes, 294, and that it was furth[illegible] provided in said act of 1864, "That the Commissioner of Internal Revenue may from time to time furnish, supply, and deliver to any manufacturer of friction or other matches, cigar-lights, or wax-tapers a suitable quantity of adhesive or other stamps, such as may be prescribed for use in such cases, without prepayment therefor, on a credit not exceeding sixty days, requiring in advance such security as may be judged necessary to secure judgment therefor to the Treasurer of the United States within the time prescribed for such payment."

Petitioner further says that said enactment of June 30th, 1864, was re-enacted July 14th, 1870, 16 Statutes, 257, with the exception that the words "on amounts over five hundred dollars, ten per centum," were changed to the following: "On amounts over five hundred dollars, ten per centum on the whole amount purchased," and that said latter enactment is incorporated into section 3425 of the Revised Statutes of the United States, excepting that the schedule containing friction matches is called "A" instead of "C."

Petitioner further says that, from time to time during said period, to wit, from the 6th day of May, 1870, to the 24th day of December, A. D. 1878, and continuously on different days of each and every month of said period, it sent to the Commissioner of Internal Revenue sums of money ranging from one th[illegible] thousand dollars, as suited

its convenience, and that said Commissioner transmitted to it stamps, as aforesaid, as needed and ordered by petitioner; so that in the account between petitioner and said Commissioner as to said stamps the creditor side showed moneys received by said Commissioner in
3 certain sums and at certain dates, but showed the receipt of no sum less than one thousand dollars, and the debtor side of said account showed that stamps as aforesaid were sent by said Commissioner to petitioner generally in different sums and at different dates, but never in amounts less than one thousand dollars.

Petitioner further says that the whole amount of stamps purchased by it as aforesaid during said period was of the face value of $3,900,395, and that the whole amount of stamps purchased by it as aforesaid prior to the 20th of January, 1873, were of the face value of $760,100.

Petitioner further says that the whole amount of money paid by it to said Commissioner as aforesaid for said stamps was $3,592,912.81, and that the whole amount of money paid as aforesaid prior to January 20, 1873, was $614,000.

Petitioner further says that allowances were made to it during said period by said Commissioner of stamps at their face value amounting to $1,195.92 for other stamps destroyed, and also an amount of $1,995 face value of stamps returned.

Petitioner further alleges and claims that, under and by virtue of the statutes aforesaid, it became and is entitled to receive $389,720.40 as commissions upon its purchase of stamps aforesaid, but avers that said Commissioner has refused to allow the same, and has allowed petitioner only in stamps at their face value $354,291.27 as such commissions, $61,400 of which was allowed prior to June 20, 1873.

Petitioner further says that before the commencement of this suit it demanded payment of the said Commissioner of the whole amount of commissions claimed, to wit, $389,720.40, but that the said Commissioner refused to pay the same, or any part thereof, excepting the sum of $354,291.27 as aforesaid, declaring that he would adhere to the long-established practice of his office until there was some legislation or judicial decision to change it; and petitioner says that the allowances made to it from time to time between May 6, 1870, and December 24, 1878, have been in accordance with the uniform practice of said
4 internal revenue office from its organization, but petitioner avers that at different times prior to 1866 protests were made to the Commissioner of Internal Revenue by and on behalf of the manufacturers of friction matches against such a construction of the statutes by him, by which only ten per cent. commissions in stamps at their face value were allowed by him upon the amount of money paid by the purchasers, instead of ten per cent. upon the whole amount of stamps purchased, and that such facts are and have always been known to petitioner.

Petitioner further says that, on the day of , it gave the required security for a credit of sixty days upon its purchase of stamps as aforesaid, or provided for in said statutes, which said security was accepted by the proper officer, and remains in full force and effect.

Petitioner further says that no transfer of said claim, or any part or interest therein, has been made.

Petitioner further says that, after allowing all just credits and offsetts, it is justly entitled to recover from the United States said sum of $35,429.13, and that it has [illegible] foregoing

against the United States for the said sum of $35,429.13 and costs of suit.

THE SWIFT & COURTNEY & BEECHER COMPANY,
By its attorney, GEO. H. WILLIAMS.

DISTRICT OF COLUMBIA,
Washington City, ss:

George H. Williams, being duly sworn, says that he is the attorney for the petitioner in the above-entitled suit, and signed the foregoing amended petition as such, and to the best of his knowledge he believes said amended petition is true.

GEO. H. WILLIAMS.

5 Sworn to and subscribed before me this 6th day of May, 1879.
[SEAL.] JOHN RANDOLPH,
Ass't Clk C't of C.

(Indorsed:) In the Court of Claims. The Swift & Courtney & Beecher Company vs. The United States. No. 11981. Amended petition. Geo. H. Williams, att'y for petitioner.

File as a substitute for the original petition.

W. A. R., *Judge, &c.*

Filed May 6, 1879. J. R.

6 II. *Demurrer to amended petition Filed.—May* 12, 1879.

And the said defendants, by their Attorney-General, say that the amended petition is not sufficient in law.

THOMAS SIMONS,
Assistant Attorney-General.

7 III. *Argument of case upon demurrer.*

And now, to wit, May 19, 1879, the demurrer to the petition in this case was argued by Mr. Blair for the defendants for the demurrer, and Mr. Williams opposed and submitted.

8 IV. *Opinion of the court on demurrer.*

RICHARDSON, J., delivered the opinion of the court:

The claimant corporation in this case was a manufacturer and proprietor of friction-matches from May, 1870, to the time of bringing its action, and during that time purchased of the defendants a large amount of proprietary stamps for which it furnished its own dies and designs, each purchase being in amount greater than $500. By the provisions of the act of July 14, 1870, ch. 255, § 4 (16 Stat., 257), and Revised Statutes, § 3425, the claimant became entitled to a commission of 10 per cent. on the whole amount purchased.

The controversy between the parties which gives rise to this action relates wholly to the manner of calculating the commission.

The act of July 4, 1862, ch. 119, § 102 (12 Stat., 477), which first established taxation by stamps as part of the internal revenue system raising money to carry on the war for the suppression of the

and deduct from the aggregate amount the sum of not exceeding 5 per cent. as commission to collectors, postmasters, stationers, or other purchasers, provided that the proprietor of any proprietary articles, among which were friction-matches, should be allowed a discount on amounts purchased at one time of not less than $50, nor more than $500, 5 per cent., and on amounts over $500, 10 per cent.

The first official circular issued by the Commissioner of Internal Revenue, promulgating regulations in regard to revenue-stamps, was on the 12th of January, 1863, and contained this provision:

"The following commission, payable in stamps, will be allowed:

"On purchases of $50 or more, 2 per centum.

"On purchases of $100 or more, 3 per centum.

"On purchases of $500 or more, 4 per centum.

"On purchases of $1,000 or more, 5 per centum."

And the words "payable in stamps" were in italics.—(Boutwell's Direct and Excise Tax-System of the United States, A. D. 1863, p. 391.)

Stamps were not only used for the payment of commissions, but they were paid at their full value without discount or commission thereon. They were put up in packages; package for which the purchaser paid $50 contained stamps to the face value of $51; a $100 package contained $102 in stamps, and so on. This regulation applied in terms only to such stamps as the Secretary of the Treasury was authorized to sell at such discount as he might allow, not exceeding the limit fixed by statute, and as to them it was clearly legal, since it reduced the commission in each case slightly below the maximum, that is, to the extent of the discount on those paid as commission.

But the Treasury Department applied the same rule in the sale of proprietary stamps for which purchasers furnished their own dies and designs, and allowed and paid in stamps at their face value the 10 per cent. commission allowed by statute, which the Secretary had no
9 authority to reduce, instead of allowing the commission on the whole amount received, as now claimed. The difference is equal to 10 per cent. in money on the stamps delivered at their face value as commissions.

This rule thus applied has been uniformly acted upon from the passage of the first stamp-act in 1862 to the present time, and has been acquiesced in by dealers in proprietary articles until the present action was instituted in May, 1879. More than forty millions of dollars have been collected of other parties for stamps sold in accordance therewith. Congress has several times revised and re-enacted the statute on which it is founded, and with a full knowledge, we may presume, of the construction adopted by the Treasury Department, has made no enactment to change it.

Under these circumstances, whatever may be our opinion of the application of the rule in the first instance to the sale of proprietary stamps for which the proprietors furnished dies and designs, we do not feel authorized to reverse it at this late day. In reaching this conclusion we follow the principle laid down by the Supreme Court in Mrs. Alexander's case (12 Wall., 177, and 76 C. Cl., 265), and in Pugh's case, recently determined (98 U. S. R., —), and by this court in Hahn's case, decided at the present term.

The demurrer is sustained and judgment must be entered thereon dismissing the claimant's petition.

10 V. *Final judgment.*

At a Court of Claims held at the Capitol, in the city of Washington, on the 26th day of May, 1879.

Judge Richardson read the opinion of the court, and it was ordered that the demurrer filed by the defendants herein be sustained and the petition be dismissed.

11 VI. *Application for and allowance of an appeal.*

And now comes the said claimant and prays for an appeal from the judgment of said court, rendered May 26, 1879, in the above-entitled case to the Supreme Court of the United States.

GEO. H. WILLIAMS,
Att'y for Claimant.

Filed July 30, 1879.

AT CHAMBERS.

Allowed.

C. D. DRAKE, *Chief Justice.*

12 In the Court of Claims.

THE SWIFT AND COURTNEY AND BEECHER Company
vs.
THE UNITED STATES. } No. 11981

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the opinion of the court; of the final judgment of the court upon demurrer; of the application by claimant for allowance of appeal to the Supreme Court of the United States, and of the order allowing same.

In testimony whereof, I have hereunto set my hand and affix' the seal of said court, at Washington, this 27th day of September, A. D. 1879.

[SEAL.] JOHN RANDOLPH,
Assistant Clerk C't of Claims.

(Indorsement on cover:) No. 266. The Swift & Courtney and Beecher Company, appellant, vs. The United States Court of Claims. Filed 27th September, 1879.

REC. 266—2

MAR 10 1882

IN THE

Supreme Court of the United States.

No. 266.

THE SWIFT & COURTNEY & BEECHER COMPANY,

APPELLANT,

vs.

THE UNITED STATES,

APPELLEE.

BRIEF FOR APPELLANT.

On the 4th of July, A. D. 1862, (12 Statutes, 479,) Congress enacted as follows:

"That any proprietor or proprietors of articles named in Schedule 'C' who shall furnish his or their own die or design for stamps to be used especially for his or their own proprietary articles, shall be allowed the following discount, viz: On amounts purchased at one time, if not less than fifty nor more than five hundred dollars, five per centum; on amounts over five hundred dollars, ten per centum."

Friction matches were named in Schedule C. The above provision was re-enacted March 3, 1863, (12 Statutes, 718,) with the exception that the word "discount" was changed to "commissions," and, so changed, was again re-enacted June 30, 1864, (13 Statutes, 294.) When this latter was re-enacted July 4, 1870, the words "On amounts over five hundled dollars, ten per centum *on the whole amount purchased*"

were substituted for the words, " On amounts over five hundred dollars, ten per centum," and as so amended, it was incorporated into section 3425 of the Revised Statutes.

What was the *intent* of Congress in these provisions? Manifestly its object was to provide for the sale of stamps for use on certain proprietary articles at a reduced value of ten per centum; that is to say, where the purchases exceeded in amount five hundred dollars, it was the obvious purpose of the law that the buyer should have them at the rate of one hundred one-cent stamps for ninety cents—one hundred one-dollar stamps for ninety dollars, and so to the full amount purchased. Section 102 of the act of July 4, 1862, (12 Statutes. 477,) provided that the Commissioner might sell to collectors and others "adhesive stamps," &c., upon the payment by said collectors to the Commissioner the amount represented by said stamps, after deducting therefrom five per centum; that is to say, the Commissioner was to give to a collector $100 in stamps for $95 in money. This sum to be deducted is described in said section as a "five per centum commission" to the collector, but strictly and legally speaking it was simply a sale of stamps at five per centum discount.

Said section 102 provides for selling stamps for use on proprietary articles at five per centum "discount." Commission and discount in this section are used indiscriminately and are intended to convey exactly the same idea. "Commission" is the word employed in subsequent statutes, but it is apparent from the nature of the transaction that it is intended to mean what is understood in law to be meant by the word "discount." Lexicographers and law writers all define commissions as an allowance made to an agent, factor, or other third party between the buyer and the seller. It is a per centum compensation made to a middle-man for buying or selling. Webster defines discount as "A sum deducted for prompt or advanced payment; an allowance or deduction from a sum due or from a credit; a certain rate per cent. deducted from the credit price of goods sold, on account of

prompt payment, or any deduction from the customary price or from a sum due or to be due at a future time."

Now in this case the so-called commission is an allowance or deduction made from the customary price, of stamps on account of the acts and circumstances of the purchaser, and therefore is exactly within the description of a "discount." There is nobody between the buyer and seller, and therefore in the nature of things there can be no "commissions." To make this distinction, however, is not particularly necessary, as the intent of Congress is clear, and that intent will be carried out by the court. (Farden's case, 13 Ct. Claims, 352.) When a match manufacturer goes to the Commissioner to buy proprietary stamps with $900, he is certainly entitled to $1,000 in stamps for that money, and this it is understood is admitted; but if he goes with $1,000 in money the Commissioner only allows him $1,100 in stamps, that is to say—for the last $100 in stamps he is compelled to pay $100 in money. He is allowed ten per cent. upon each $100 of the $900 in money, which buys $1,000 in stamps, so that it necessarily follows that the $100 which, added to the $900, makes $1,000 in money, buys only $100 in stamps, when only $1,100 in stamps is given for $1,000 in money. The Commissioner should give for $1,000 in money $1,110 in stamps, and then upon each $100 of the $1,000 ten per centum is allowed. The Commissioner instead of allowing ten per cent. in money upon the amount of money paid, allows ten per cent. in stamps, counting a dollar in stamps as equal in value to a dollar in money. This he has ao right to do. Stamps are not currency or money. They are a commodity to be bought and sold, and their statutory value in a purchase exceeding $500 is ninety cents to the dollar. Suppose a match manufacturer wants to buy $1,000 in stamps, and no more. He sends $1,000 in money. He is entitled to the $1,000 in stamps and a return of $100 in money. But where the account is running as it is with the petitioner, the Commissioner does not return the $100, but keeps it, credits petitioner with that amount in money, and returns $100 in

stamps; and in this way he has managed to sell to petitioner since the 6th of May, 1870, $354,291.27 in stamps for $354,-291.27 in money. It is only necessary to understand this point to see the correctness of petitioner's claim.

Substantially the decision in Dailey's case, 7th Ct. of Claims, 383, supports the foregoing views.

II.

It appears that the running account, in this case, between the petitioner and the Commissioner commenced on the 6th of May, A. D. 1870.

This suit was brought on the 20th of January, A. D. 1879, and the question is made as to whether or not a recovery can be had upon that part of the account accruing prior to January 20, 1873.

It must be admitted that if this suit was between private persons the statute of limitations would not run against any part of said account.

Hodge *vs.* Manley, 25 Vermont, 210.
Angell on Limitations, 143 and 148.

When the Government is properly in court as a party it is subject to the rules of law applicable to other parties, unless exempt by statute.

While it is true that a statute of limitation does not run against the Government, unless so expressly provided, it is also true that a statute of limitations in favor of the Government is to be construed as it would be if set up by a citizen.

III.

No protest by petitioner was necessary to entitle it to recover. The Government made a contract with petitioner to pay it a certain amount of money, in consideration of its purchasing a certain amount of stamps. (See Dailey's case.) This contract the Government is bound to perform. There

has been no settlement made or receipt given. There has been no waiver of petioner's rights. Petitioner may at any time while said account is running, demand full payment. Defendant cannot set up part payment in satisfaction of a debt.

IV.

The petition shows that for several years the match manufacturers protested against the present construction of the statute by the Commissioner. This has always been known to petitioner. Any protest by it would have been an idle and useless act. The Commissioner having repeatedly decided the question, petitioner was bound to treat it as settled, so far as the Commissioner was concerned. Petitioner was bound to take the stamps as they were delivered by the Commissioner. It could not otherwise carry on its business.

It does not appear that there was any protest in Dailey's case. (See also Adam's case, 1st Court of Claims, 306.

It amounts to nothing to say that the present has been the uniform construction of the law by the Internal Revenue Bureau.

The match manufacturers did every thing they could to prevent or change such construction. No consequence can be attached to continued misconstruction of a statute by an officer of the Government, unless the person conplaining has done something to estop his complaint.

One object in allowing citizens to sue in this Court is to correct such misconstructions. Defendant can take no advantage of the lapse of time except under the statute of limitations.

V.

The foregoing is petitioner's brief before the Court of Claims. That Court attempted two answers to it.

First. That the amount involved was large.

Second. That petitioner and other match manufacturers had acquiesced in the uniform ruling upon the subject by the Treasury Department.

The assertion that the amount involved is large, is no answer to petitioner's claim, for several reasons.

1. There is no allegation or evidence in the record to support this assumption. How does the Court know that "more than fifty millions of dollars have been collected from other parties for stamps," or that there has been or will be any other claim made against the Government like the one under consideration? These are not matters of which the Court can take judicial notice. There is no use in having pleadings or proofs in the Court of Claims if cases are to be decided upon calculations or conjectures or rumors outside of the record.

2. Admitting that forty millions of proprietary stamps have been sold by the Government since May 1862, all the claims like and including the one in this suit could only aggregate $400,000, and when it is considered that a great number of these must necessarily be barred by the statute of limitations, and that many of the purchasers of such stamps have probably settled their accounts with the Government, it will be seen that the "forty millions" argument is entitled to very little weight.

3. Is it a legitimate objection for the Court to make to a claim otherwise legal and just, that it is large and therefore ought not to be allowed? Is the law one way for a large claim and another way for a small claim?

The argument of the Court of Claims that the ruling of the defendant upon this subject has been acquiesced in by dealers in proprietary stamps until the present action was instituted, in May, 1879, is not true in point of fact, for this suit was instituted in January, 1879, and the petition shows that repeated protests were made against the ruling by and

on behalf of the manufacturers of friction matches; nor is it true in point of fact, that Congress has frequently legislated upon this subject without changing the law, as alleged by the court below, for in 1870 the words "on amounts over five hundred dollars, ten per centum *on the whole amount purchased*," were substituted for the words "on amounts over five hundred dollars, ten per centum." The very object of this change in phraseology was to adopt the construction of the statute contended for in this case by petitioner. Prior to 1856, as appears by the record, the manufacturers of friction matches protested against the payment of their commissions in stamps at their face value, but their protests were disregarded. Petitioner was incorporated in 1870, and had knowledge of these protests and the action of the Department thereon. (Record 2.) Was it necessary, in view of such facts, for petitioner to protest again and continue to protest, in order to save its rights? Does the law require a party to do a vain and useless act?

To defeat petitioner's claim on the ground of acquiescence, the court below refers to certain decisions of this court; but those cases hold the law to be as decided by the Department, though they speak of departmental rulings as entitled to the respect of the court. But it is plain, and indeed is admitted by the Court of Claims, that the ruling of the Department in this case was wrong; the error is susceptible of mathematical demonstration.

To affirm the estoppel of acquiescence, as laid down by the Court of Claims in this case, is simply to hold that that court may set up a statute of limitations in each case, according to its own judgment. Six years is the limitation fixed by statute. Within thirty days before this suit the Government had added to its indebtedness to the petitioner. Any party may exercise his judgment as to when he will sue the Government for what it owes him, provided the statutory limitation is not a bar. This suit is for an indebtedness that accrued from day to day from 1870 to the commencement of this action. Clearly the court below had no right to deny

Second. That petitioner and other match manufacturers had acquiesced in the uniform ruling upon the subject by the Treasury Department.

The assertion that the amount involved is large, is no answer to petitioner's claim, for several reasons.

1. There is no allegation or evidence in the record to support this assumption. How does the Court know that "more than fifty millions of dollars have been collected from other parties for stamps," or that there has been or will be any other claim made against the Government like the one under consideration? These are not matters of which the Court can take judicial notice. There is no use in having pleadings or proofs in the Court of Claims if cases are to be decided upon calculations or conjectures or rumors outside of the record.

2. Admitting that forty millions of proprietary stamps have been sold by the Government since May 1862, all the claims like and including the one in this suit could only aggregate $400,000, and when it is considered that a great number of these must necessarily be barred by the statute of limitations, and that many of the purchasers of such stamps have probably settled their accounts with the Government, it will be seen that the "forty millions" argument is entitled to very little weight.

3. Is it a legitimate objection for the Court to make to a claim otherwise legal and just, that it is large and therefore ought not to be allowed? Is the law one way for a large claim and another way for a small claim?

The argument of the Court of Claims that the ruling of the defendant upon this subject has been acquiesced in by dealers in proprietary stamps until the present action was instituted, in May, 1879, is not true in point of fact, for this suit was instituted in January, 1879, and the petition shows that repeated protests were made against the ruling by and

on behalf of the manufacturers of friction matches; nor is it true in point of fact, that Congress has frequently legislated upon this subject without changing the law, as alleged by the court below, for in 1870 the words "on amounts over five hundred dollars, ten per centum *on the whole amount purchased*," were substituted for the words "on amounts over five hundred dollars, ten per centum." The very object of this change in phraseology was to adopt the construction of the statute contended for in this case by petitioner. Prior to 1856, as appears by the record, the manufacturers of friction matches protested against the payment of their commissions in stamps at their face value, but their protests were disregarded. Petitioner was incorporated in 1870, and had knowledge of these protests and the action of the Department thereon. (Record 2.) Was it necessary, in view of such facts, for petitioner to protest again and continue to protest, in order to save its rights? Does the law require a party to do a vain and useless act?

To defeat petitioner's claim on the ground of acquiescence, the court below refers to certain decisions of this court; but those cases hold the law to be as decided by the Department, though they speak of departmental rulings as entitled to the respect of the court. But it is plain, and indeed is admitted by the Court of Claims, that the ruling of the Department in this case was wrong; the error is susceptible of mathematical demonstration.

To affirm the estoppel of acquiescence, as laid down by the Court of Claims in this case, is simply to hold that that court may set up a statute of limitations in each case, according to its own judgment. Six years is the limitation fixed by statute. Within thirty days before this suit the Government had added to its indebtedness to the petitioner. Any party may exercise his judgment as to when he will sue the Government for what it owes him, provided the statutory limitation is not a bar. This suit is for an indebtedness that accrued from day to day from 1870 to the commencement of this action. Clearly the court below had no right to deny

a recovery for so much of the indebtedness as arose within six years before suit brought, whatever it might say as to the balance of the claim. Suppose the Treasury officials under some unlawful pretext, had in 1870 withheld ten per cent. from the salary of one of the justices of this court, and from every subsequent payment had made a similar deduction, and in 1879 suit was brought for the amount so withheld, could the whole claim or any part of it be defeated because the suit was not brought at an earlier date?

This court, in numerous cases, has overruled the decisions of the Treasury Department, both as to custom and internal revenue duties, and notably in the case of Collector *vs.* Day, 11 Wallace, 113, in which this court decided contrary to the long and uniform ruling of the Treasury, that the salary of State officers were not subject to Federal taxation, and a large amount of money was refunded by the Government under that decision. Again in the Dollar Savings Bank *vs.* The United States, 19 Wallace, 227, the construction of the statute by the Commissioner of Internal Revenue, touching the subject-matter of that suit, was expressly rejected by this court.

Mr. Justice Woodbury, in speaking for the court, in Greely *vs.* Thompson, 10 How., 225, said: "The orders as well as the opinions of the heads of the Treasury Department, expressed in either letters or circulars, are entitled to much respect, and will always be duly weighed by this court; but it is the laws which are to govern, rather than their opinion of them."

In Peabody *vs.* Stark, 16 Wallace, 240, Mr. Justice Miller, in delivering the opinion of this court, said that while the court is willing to adopt a fair and reasonable construction of the statute by the Commissioner of Internal Revenue, "*we do not hold such ruling in general obligatory upon us.*"

It is, therefore, respectfully submitted that the Court of Claims erred—

First. In sustaining defendant's demurrer to petitioner's petition.

Second. In dismissing said petition.

Third. In rendering judgment for defendant, and that its judgment ought to be reversed.

GEO. H. WILLIAMS,
For Appellant.

OFFICE SUPREME COURT U.S.
FILED
APR 4 1882
JAMES H. McKENNEY

In the Supreme Court of the United States.

OCTOBER TERM, 1881.

THE SWIFT, &C., COMPANY *vs.* THE UNITED STATES. } No. 266.

BRIEF FOR THE UNITED STATES.

This case stands upon petition and demurrer.

The points in the defence *are* (1), *the acquiescence by the appellants* in the practical construction of the statute in question by the Treasury Department, and (2), as regards a part of the claim, *the statute of limitations.*

1. As regards the first point, the petitioner states (folio 3) that "the allowances made to it from time to time between May 6, 1870, and December 24, 1878, have been in accordance with the uniform practice of said Internal Revenue Office from its organization, but petitioner avers that at different times, prior to 1866, protests were made to the Commissioner of Internal Revenue by and on behalf of the manufacturers of friction matches against such a construction of the statutes by him, by

which only 10 per cent. commissions in stamps at their face value were allowed by him upon the amount of money paid by the purchasers, instead of 10 per cent. upon the whole amount of stamps purchased, and that such facts are and have always been known to petitioner."

This admission is relied upon by the government here as showing that the Treasury Department made the contract in question with the petitioners and subsequently executed it *bona fide*, upon an understanding of its terms that was by them previously made known to the public, including the appellant; and that the latter made no exception thereto, but, during more than eight years received payments, and made fresh applications for stamps, without demur; the whole constituting a course of dealing that is inconsistent with the existence of a legal contemporaneous claim like that now set up.

The view at the Treasury evidently was that in delivering stamps it could SELL *to the receiver thereof one part*, and *could* PAY *to him the other part;* the *payment* being of so much thereof as satisfied his "discount" or "commissions" upon his *purchase*.

The only material objection to this arrangement seems to be that the Treasury could not *oblige* the purchaser to take his discount *in stamps; i. e.*, to treat them *as money*. However, if he practically acquiesced therein, *i. e.*, received a part of every package of stamps upon the understanding with which he knew them to have been delivered to him (as it seems he must necessarily be assumed to have done), then no question of *discount* upon so many as were *paid* (in contradistinction to *sold*) to him could arise. For he took these upon a different footing, one upon which indeed the law may not have compelled him to take them, but at the same time one that

it was competent for him to agree to; the scheme in the meantime being one as to which the officer who devised it had no sort of pecuniary interest, but was acting quasi judicially, and in good faith, for the public alone.

If the stamps were, in part, treated as *money*, the company received *discount* at every transaction, being required to account for so much only of every package as upon the theory of the government was regarded as *purchased*.

2. The question upon the statute of limitations is presented by the statement in the petition (folio 3), as to the delivery of a part of the stamps *anterior to January* 20, 1873, *i. e.*, more than six years before the bringing of this suit. (Rev. Stat., sec. 1069.)

For other matter in this connection, I beg to refer to the valuable suggestions made in the opinion of the learned court below.

S. F. PHILLIPS,
Solicitor-General.

15-696

OFFICE SUPREME COURT U. S.
FILED
APR 17 1882
JAMES H. McKENNEY, CLERK

To the Supreme Court of the United States of America:

The petition of John Anderson Mason, late of the City of Washington, District of Columbia, respectfully shows to this Court:

1st. That your petitioner was, on or about the 20th day of February, 1882, arraigned before a certain tribunal, calling itself a Military Court-Martial of the Army of the United States, (claimed to have been organized and held uner and by virtue of certain provisions of the Articles of War,) upon the charge or offense of assault with intent to kill one Charles J. Guiteau, on or about the 11th day of September, 1881; that said Charles J. Guiteau, upon said last-mentioned day, was and had been imprisoned in the jail in the City of Washington, District of Columbia, on the charge of having wilfully and deliberately murdered James A. Garfield, the President of the United States of America, on the 2d day of July, 1881.

2d. That on the said 11th day of September, 1881—the day upon which it was alleged and claimed before said court-martial that your petitloner had committed the said assault with intent to kill aforementioned—the said Charles J. Guiteau was a civilian, and was not enlisted in or a member of the army or navy service of the United States of America, and your petitioner was not on duty or in the discharge of actual military duties at the time in question.

3d. That said court-martial aforementioned, notwithstanding the refusal of your petitioner to acknowledge its jurisdiction, power, and authority in the premises to arraign and try your petitioner upon said chage, and not-

withstanding the refusal of your petitioner to plead to said charge or offense alleged against him before said court martial, said court-martial directed of its own accord a plea of "not guilty" to be entered, and proceeded thereafter to try your petitioner upon said alleged charge and offense.

4th. That thereafter such proceedings were had by said court-martial in the premises that on or about the 10th day of March, 1882, said court-martial adjudged your petitioner as "guilty" of the charge or offense alleged against him, and pronounced judgement against your petitioner, and thereupon sentenced, ordered, and decreed that your petitioner be thereupon and thereafter absolutely discharged from the service of the army of the United States of America, and that in addition your petitioner be thereafter imprisoned and suffered to undergo imprisonment in the penitentiary for the period of eight years.

5th. That your petitioner is informed and verily believes that said alleged sentence and judgment by said court-martial against your petitioner by said court-martial been since formally approved, or is claimed to have been so done, by General Winfield S. Hancock, of the United States army, and thereafter by the Hon. Robert T. Lincoln, the Secretary of War.

6th. That said sentence and judgment (so-called) of said court-martial has been since carried into effect against your petitioner, who was and has been declared discharged from the army of the United States of America, and also has begun and is now undergoing the term of imprisonment for eight years in the penitentiary, under which latter punishment your petitioner has been removed to and is now actually confined in the Albany penitentiary, in the county of Albany and State of New York, and is in the custody of Clinton D. McDougall, the

marshal of the United States for the Northern District of New York. and also of John McEwen, the keeper of the said Albany penitentiary, in the State of New York.

7th. And your petitioner further shows to this Court, and states, on the advice of his counsel, James M. Lyddy, Es., of No. 318 Broadway, New York City, that said alleged court martial, which assumed to and did try and sentence your petitioner upon the aforesaid charge or offense, was illegal in its organization as well as in its procedure; that it was wholly without jurisdiction in the premises, both as to the charge alleged as well as of the person of your petitioner; that the Articles of War, unden which said court-martial is alleged to have been constituted and convened, had jurisdiction of the offense or crime charged against your petitioner ONLY IN TIME OF WAR, and not in time of peace; and at the time said court-martial tried, convicted, and sentenced your petitioner the United States of America was at peace with all nations; that even if the said court-martial had jurisdiction in the premises, it exceeded its power in imposing the sentence and judgment aforesaid, as the same is in excess of any penalty or punishment authorized by law, and void and untenable aocordingly; that your petitioner was not tried, convicted, and sentenced for any alleged disorders or neglect against good order and military discipline in the United States army, nor for any offence or crime, &c., of which the said alleged court-martial had jurisdiction or authority under the Articles of War and the provisions of the statutes in such cases provided; but on the contrary, was tried, convicted, and sentenced for an alleged offence or crime, to wit, "*An assult with intent to kill*," of which the civil authorities then had and now have exclusive jurisdiction, and upon the trial of which by the civil authorities your petitioner was and is entitled, under and by virtue of the

provisions of the Constitution of the United States, particularly Article VI thereof, and the law in such cases provided, to a trial by jury, all of which was denied to your petitioner, wrongfully and unlawfully in the premises.

Your petitioner further shows, upon his information and belief, that the Judge Advocate-General (Swaim) now holds in his possession all the proceedings of said court-martial which assumed to and did try and convict and sentence your petitioner; and it is necessary, as your petitioner is advised by his counsel and verily believes to be true, that said Judge Advocate-General (Swain) should certify and return all of said proceedings of said court-martial to this court, under and by virtue of a writ of *certiorari* issued to him from, out of, and under the seal of this court in the premises, to the end that this honorable court may be fully and fairly advised as to the jurisdiction, authority, and proceedings of said court-martial, to the end that the great wrong and injustice done to your petitioner may be corrected speedily.

And your petitioner further shows that he now is and ever since the 11th day of September, 1881, has been a prisoner, confined in jail in the city of Washington, D. C. and more lately since the 16th day of March, 1882, confined in the Albany penitentiary, Albany, New York, in the custody of the Marshal for the Northern District of New York, and of the governor or keeper of the Albany penitentiary, Albany, in the State of New York, under the said illegal judgment and sentence pronounced against him on the 10th day of March, 1882, by said court-martial, and is restrained of his liberty, in violation of the Constitution of the United States of America and of the law in such case made and provided.

That annexed hereto is a copy of the judgment or commitment under which your petitioner is now unjustly and illegally restrained of his liberty aforesaid.

Wherefore your petitioner prays that a writ *habeas corpus* issue out of and under the seal of this court, directed to the said Clinton D. McDougall, United Siates marshal for the northern district of New York, and to John McEwen, the governor or keeper of the Albany penitentiary, New York, commanding them and each of them to produce your petitioner before this honorable court, at the City of Washington, D. C., at such time as the Court shall direct, and that they and each of them then and there show the cause of your petitioner's deten tion, to the end that your petitioner may be discharged from custody.

And your petitioner also prays that a writ of *certiorari* may issue out of and under the seal of this court, directed to the Judge Advocate-General (Swaim) of the United States army, commanding him to certify and return to this honorable court all the proceedings of said court-martial, including the authority for its organization, the specifications and charges against your petitioner, the testimony taken thereon, with the sentence, judgment, findings and order for commitment of said court-martial, and all the record of said court-martial respecting the same and the adjudication thereon, to the end that the errors therein may be corrected by this honorable court.

And your petitioner will ever pray, &c.

JOHN ANDERSON MASON.

Dated Albany, New York, March 21st, 1882.

NORTHERN DISTRICT OF NEW YORK, *ss:*

John Anderson Mason, being duly sworn, deposes and says that he is the petitioner herein; that he has read the foregoing petition subscribed by him, and knows the contents thereof, and that the same is true to his own knowledge, except as to any matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

JOHN ANDERSON MASON.

Sworn to before me this 21st day of March. 1882.

[SEAL.] WM. F. RATHBONE.

Notary Public, Albany Co., N. Y.

STATE OF NEW YORK,
City and County of Albany, Clerk's Office. } ss.

I, John Larkin, clerk of the said city and county, and also clerk of the supreme court and county courts, being courts of record held therein, do hereby certify that Wm. F. Rathbone, whose name is subscribed to the jurat of the annexed affidavit, was on the day of the date thereof a notary public in and for the county of Albany, dwelling in said county, duly authorized to administer oaths for general purposes; and that I am well acquainted with the handwriting of the said notary public, and verily believe that the signature to the said jurat is genuine.

In testimony whereof I have hereunto set my hand and affixed my official seal, this 21st day of March, 1882.

[SEAL.] JOHN LARKIN, *Clerk.*

CITY OF WASHINGTON,
District of Columbia. }

William M. Lyddy, being duly sworn, deposes and says that he is one of the attorneys for John A. Mason, the petitioner herein; that annexed hereto, marked Exhibit No: 1, is a true copy of the judgment and commitment of the General Court-Martial which recently convened at Washington Barracks, D. C., for the trial of the said John A. Mason, and on which the said petitioner, John A. Mason is now confined and imprisoned in the Albany Penitentiary, in the county of Albany and State of New York, U. S. A.; that deponent compared the annexed copy, Exhibit No. 1, with the original judgment and commitment now on file with the governor or keeper of the Albany penitentiary, Albany, State of New York, and that the same is a true copy rhereof, and of the whole of said original.

WILLIAM M. LYDDY.

Subscribed and sworn to before me, this 23d day of March, 1882. CHAS. B. BEALL,
[SEAL.] *Notary Public, District of Columbia.*

"*Exhibit No.* 1."—*G. C. M.*

SERGEANT JOHN A. MASON, BATTERY "B," 2D ARTILLERY.

HEADQUARTERS DEPARTMENT OF THE EAST,
GOVERNOR'S ISLAND, N. Y. H., *March* 10, 1882.

GENERAL COURT MARTIAL ORDERS, No. 6.

I. Before a general court-martial, which convened at Washington Barracks, D. C., by virtue of paragraph 2, Special Orders No. 168, series of 1881, and paragraphs 1, 2, and 3, Special Orders No. 24, current series from these headquarters, and of which Lieutenant Colonel Henry R. Mizner, 10th Infantry, is president, was arraigned and tried Sergeant John A. Mason, Battery "B," 2d Artillery.

Charge.—Violation of the 62d Article of War.

Specification.—In this, that First Sergeant (now Sergeant) John A. Mason, Battery "B," 2d Artillery, having been ordered with his battery from Washington Barracks for guard duty at the United States jail, in the city of Washington, D. C., and having arrived at said jail for said duty, did thereupon, with intent to kill Charles J. Guiteau, a prisoner then confined under the authority of the United States in said jail, willfully and maliciously discharge his musket, loaded with ball cartridge, at said Guiteau through a window of said jail into a cell then occupied by the said Guiteau. This at the District jail, Washington, D. C., on or about September 11, 1881.

PLEA.

To the specification: "Not Guilty."
To the charge: "Not Guilty."

FINDING.

Of the specification: "Guilty."
Of the charge: "Guilty."
Received March 16, 1882, penitentiary, Albany.
U. G. C. Martial
v.
John A. Mason.

SENTENCE.

"To be dishonorably discharged the service of the United States, with the loss of all pay and allowances now due or to become due to him, and then to be confined at hard labor in such penitentiary as the proper authority may direct for eight (8) years."

II. The proceedings, findings, and sentence in the foregoing case of Sergeant John Mason, Battery "B," 2d Artillery, are approved, and the sentence will be duly executed. Subject to the approval of the Secretary of War. The penitentiary at Albany, N. Y., is designated as the place for the execution of so much of the sentence as relates to confinement at hard labor. He will be held at Washington Barracks until further orders are given in regard to his disposition.

III. The General Court-Martial which convened at Washington Barracks, D. C., by virtue of paragraph 2, Special Orders No. 168, series of 1881, and paragraphs 1, 2, and 3, Special Ordeas No. 24, current series, from these headquarters, and of which Lieutenant-Colonel Henry R. Mizner, 10th Infantry, is president, is hereby dissolved.

By command of Major-General Hancock.

WILLIAM D. WHIPPLE,
Assistant Adjutant-General.

Official.

WM. D. WHIPPLE. *A. A.-G.*

In the matter of the petition of JOHN ANDERSON MASON for writs of habeas corpus, etc.

City of Washington, District of Columbia, ss:

WILLIAM M. LYDDY, being duly sworn, deposes and says: I am one of the attorneys for the petitioner herein. The proceedings or record of the military court-martial which tried, convicted and sentenced John A. Mason, the petitioner herein, are now in the possession of and on file with the Judge Advocate General, D. G. Swaim, in the City of Washington, and within the District of Columbia and outside the Northern District of New York, where the petitioner is confined, and in deponent's opinion it is a very grave question, whether any process or *writ* of *certiorari* from the Northern District of New York could reach or compel the production of the proceedings of the military court-martial, now on file and within the District of Columbia; hence, to avoid any unnecessary delay, it was deemed wisest and best to make the application to this honorable Court, and in the interests of the petitioner and in the furtherance of justice.

WILLIAM M. LYDDY.

Subscribed and sworn before me this 24th day of March, 1882.

CHAS. B. BEALL,

[SEAL] *Notary Public District of Columbia.*

In the Matter of the Petition of JOHN A. MASON, for Writs of Habeas Corpus and Certiorari, etc.	*Supplemental Petition.*

To the Supreme Court of the United States:

The Supplemental Petition of John A. Mason, a citizen of the United States, now restrained of his liberty and confined in the Albany Penitentiary in violation of the Constitution and the Laws of the United States, respectfully shows to this Court as follows:

1st. Your petitioner begs leave to refer to his former Petition duly verified by him herein in this matter and now duly filed in this Court and he affirms and reiterates the allegations of the same as therein alleged as fully as if the same were herein repeated and set forth at large.

2d. And your petitioner further shows that after the sentence and judgment of the said Military Court Martial against your petitioner, and after its approval thereof by General W. S. Hancock and the Hon. Robert T. Lincoln, the Secretary of War, as alleged and more fully set forth in my former petition herein, and while your petitioner thereunder was confined, in the United States Jail in the said District of Columbia, and on or about the 15th day of March, 1882, an application by a duly verified petition made by your petitioner in the manner prescribed by Law for a Writ of Habeas Corpus, and on your petitioners behalf was duly made to the Hon. Judge Wylie, one of the Justices or Judges of the Supreme Court of the District of Columbia, and who was then holding (as your petitioner is informed on information and belief) Circuit Court in and for said District of Colnmbia, with all the powers and jurisdiction conferred on a Circuit Court of the United States; that the said petition used on said application before the said Judge Wylie for a Writ of Habeas Corpus as afore-

mentioned, was, as your petitioner is advised by his Counsel and verily believes, in the form and manner prescribed by Law in such cases, and substantially contained the allegations and statements referred to and set forth, in my former verified petition to this Court heretofore presented and now on file in this Court; that said Judge Wylie of the Supreme Court of the District of Columbia, took the said application for a Writ of Habeas Corpus on behalf of your petitioner, and so made to him as aforesaid under advisement in the premises, and in the afternoon of the same day, rendered his decision on my said application for Writ of Habaes Corpus in the premises, denying said application and refusing the said Writ of Habeas Corpus on behalf of your petitioner and so asked for as aforementioned.

3d. That soon thereafter, and on the 15th day of March, 1882, and before any further proceedings could have been had, and taken in the said Supreme Court of the district of Columbia on behalf of your petitioner, your petitioner under said sentence and judgment (so-called) against your petitioner, by said court partial was removed outside of the Jurisdiction of the district of Columbia, to wit; to the Albany Penitentiary, in the County of Albany, in the State of New York, where your petitioner since then and now is still confined and restrained of his liberty in violation of the constitution of the United States and the Law in such cases provided and as more fully alleged and setforth in this and my former petition heretofore filed herein.

Wherefore your petitioner prays for the waits of *Habeas Corpus* and *Certiorari* herein as prayed for in my petition to this Honorable Court, dated and verified on the 21st day of March, 1882, and now on file in this Court and for such other and further relief in the premises, as may be just.

And your petitioner will ever pray.

Dated Albany, New York, April 13th, 1882.

(Signed) JOHN A. MASON.

NORTHERN DISTRICT OF NEW YORK.

JOHN A. MASON.

Being duly sworn deposes and says; that he is the petitioner herein; that he has heard, read the forgoing petition subscribed by him, and knows the contents thereof; and that the same is true to his own knowledge except as to any matters therein statad to the alleged on information and belief, and as to those matters he believes it to be true.

Sworn to before me this 13th day of April, 1882.

JOHN A. MASON.

WM. F. RATHBONE,
Notary Public,
[SEAL.] Albany Co., N, Y.

STATE OF NEW YORK,
City and County of Albany, Clerk's Office, } ss.

I, JOHN LARKIN, clerk of the said city and county, and also clerk of the Supreme and County Courts, being courts of record held therein, do hereby certify that Wm. F. Rathbone, whose name is subscribed to the jurat of the annexed affidavit, was, on the day of the date thereof, a notary public in and for the county of Albany, dwelling in said county, duly authorized to administer oaths for general purposes; and that I am well acquainted with the handwriting of the said notary public, and verily believe that the signature to the said jurat is genuine.

In testimony whereof, I have hereunto set my hand and affixed my official seal, this 13th day of April, 1882.

(SEAL.) JOHN LARKIN, *Clerk.*

United States Supreme Court.

In the Matter of the Petition of JOHN ANDERSON MASON for Writs of Habeas Corpus and Certiorari.	Petitioner's answering affidavit.

District of Columbia, City of Washington, } ss.

James M. Lyddy, being duly sworn, deposes and says:

I am of counsel for the petitioner herein. I know the Hon. Andrew Wylie, one of the justices or judges of the Supreme Court of the District of Columbia, and have called upon and have seen and conversed with Judge Wylie in reference to the application for the writ of habeas corpus duly made to him while holding court on the 15th day of March, 1882, on behalf of the above-named petitioner. Said Mr. Justice Wylie informed your deponent that on the said 15th day of March last past, an application was duly made to him by a duly verified petition on behalf of the petitioner, John A. Mason, for a writ of habeas corpus; that he (Justice Wylie) took the matter under judicial consideration, and reserved his decision, and that in the afternoon of the same day he duly refused said application for the writ of habeas corpus so applied for on behalf of said petitioner; that afterwards, (and not before,) the petition of said petitioner was withdrawn from

said court for the purpose, as was stated, of presenting an application to the Court in Banc on the following day, and hence the reason why said petition so presented to him was not put on the files of the court below; but deponent has no doubt but that Judge Wylie will certify the facts to this court if asked or requested by this court so to do. Deponent therefore prays that a writ of certiorari to the Supreme Court of the District of Columbia be issued, (if the court thinks the same necessary,) in addition to the writs already prayed for herein.

JAMES M. LYDDY.

Sworn to before me this 25th day of April, 1882.

Geo. B. Bradley

Notary Public, Dist. of Col.

OFFICE SUPREME COURT U.
FILED
APR 17 1882
JAMES H. McKENNEY, CLK

U. S. Supreme Court.

In the matter of the petition of JOHN ANDERSON MASON, for writs of *Habeas Corpus*, and *Certiorari*, etc.

BRIEF AND POINTS OF PETITIONER.

This is an application on behalf of the petitioner (Sergeant Mason) pursuant, to the rule to show cause heretofore granted fer a writ of *habeas corpus* directed to the keeper of the Albany penitentiary, New York, to produce the body of the petitioner before this Court, for the purpose of an inquiry into the cause of imprisonment, and which the prisoner claims is unlawful, unauthorized and in violation of the Constitution of the United States. The writ of *certiorari* is also asked for on behalf of the petitioner directed to the Judge Advocate General of the United States army (D. G. Swaim), for the purpose of having the record and proceedings of the military court-martial, which tried and condemned the petitioner, returned to this Court.

This record, with the proceedings of the military court-martial, are now on file with the said Judge Advocate General in pursuance of the Articles of War No. 113, Section 1342, of the Revised Statutes of the United States.

STATEMENT OF THE CASE.

The petitioner was tried before a military court-martial recently held in the City of Washington, D. C,, to wit: About the 25th day of February, 1882, upon the charge or offense of "assault with intent to kill" one Charles J. Guiteau) a prisoner who was then and for some months had been confined at the United States jail, in the City of Washington, D. C., on the charge of having wilfully and deliberately murdered the late President Garfield.

On the 10th day of March last, said military court-martial adjudged the petitioner "guilty" of the charge against him, to wit: "*Assault with intent to kill*," and pronounced upon the petitioner the following sentence:

SENTENCE.

"To be dishonorably discharged the service of the "United States, with the loss of all pay and allow-"ances now due or to become due to him, *and then* to be "confined at hard labor in such penitentiary as the *proper* "*authority* may direct for eight (8) years."

The Albany penitentiary was thereafter designated by the "property authority," at which place the petitioner claims he is now imprisoned and restrained of his liberty in violation of law and the Constitution of the United States.

On the morning of the 15th day of March last past, as appears from the Supplemental Petition in this matter and now presented to this Court, an application on behalf of the petitioner for a Writ of Habeas Corpus, was made to the Hon. Judge Wylie, of the Supreme Court of the District of Columbia, and then holding Circuit Court, and clothed under the Laws with all the powers and jurisdiction of a Circuit Court of the United States, for the purpose of producing the body of the petitioner

before the Court, and having the question determined as to the legialty of his detention. Judge Wylie took the application under advisement and reserved his decision, and in the afternoon of the same day, he denied the application for the Writ of Habeas Corpus, so made on behalf of the petitioner.

Before any further proceedings could be had or taken in the Supreme Court of the District of Columbia, and on the evening of the same day, March 15th, 1882, the petitioner was removed to the Albany Penitentiary, under Military Escort, and outside the Jurisdiction of the District of Columbia, where he is now undergoing the sentence of imprisonment of Eight Years, imposed by the Military Court Martial.

The petitioner claims, that the Military Court Martial, which tried and sentenced him to this term of imprisonment for the common law offence, of "Assault with Intent to Kill," never had or acquired any jurisdiction over the petitioner, or of the offence or crime charged against him; and that his imprisonment is wholly without authority of Law, and in violation of the provisions of the Constitution of the United States.

The petitioner therefore applies to this Court, the highest Court of the Nation—for the prerogative Writ of Habeas Corpus, aided by the Writ of Certiorari, as prayed for to the end that he may be discharged from further imprisonment.

POINTS.

I.

This Oourt has jurisdiction to grant the Writs of Habeas Corpus and Certiorari as prayed for.

The Constitution of the United States provides that: "The privilege of the Writ of Habeas Corpus shall "not be suspended, *unless*, when in cases of rebellion or "invasion, the public safety may require it." (Section 9, "Article 6, Const.)

By the Constitution the right of personal liberty was guaranteed to the citizen, but the power to enforce the remedy, when that right was invaded or taken away, was not given, if the Supreme Court in this case has not jurisdiction. It is an acknowledged principle of jurisprudence that if a power to do a thing is given it includes the use of the means necessary and proper to exercise it.

Chief Justice Chase says (Ex-parte Yerger 85) on this constitutional provision regarding the Writ of Habeas Corpus:

"When the Confederated Colonies became United "States, and the formation of a common government "engaged their deliberations in convention, this great writ "found prominent sanction in the Constitution. The "terms of this constitutional provision *necessarily imply* "*judicial action.*"

"In England all the courts were open to applicants for "this Writ, and it is hardly supposable that under the "new government, founded on more liberal ideas and "principles, any Court would be intentionally closed to "them."

To use again the words of the learned Chief Justice, it is clear that, "the terms of this Constitutional provision, *necessarily imply Judical power;*" let us therefore see to what Court under, the Constitution, is the Judicial power of the United States, entrusted?

Article 3d, Section I, of the Constitution provides that "The Judicial power of the United States, shall be ves- "ted in one Supreme Court, and in such inferior Courts, "as the Congress may from time to time ordain and es- "tablish." Section 2, provides that,

"The Judicial power, shall extend to all cases in Law "and equity, arising under the Constitution, the Laws of the United States, &c," surely the personal liberty of the Citizen, of which no man shall be deprived without due process of Law, is a case arising under the Constitu-

tion and the Laws of the United States, within the letter and spirit of section 2, above cited, and requiring the exercise of "judicial power," by the great writ of *Habeas Corpus*, under section 1, already cited.

It is conceded that the Supreme Court has original Jurisdiction, under section 2, of article 3, of the Constitution, in all cases in Law and equity affecting Ambassadors, other public Ministers and Consuls, and that these foreign officials who *are not citizens*, of the United States shall have the privilege of a writ of *Habeas Corpus*.

To hold therefore, that this Court shall not have power to grant this writ in the present case to the petitioner, is to affirm,

1st. That *a foreigner*, yea, even the humblest lackey of the most despotic European Government, shall have rights and privileges, under the American Constitution in regard to personal liberty, and to this great writ, which are denied to American citizens and which even the latter cannot claim.

2d. That while *a foreigner* may apply to the Supreme Court *originally*, for a Writ of Habeas Corpus, a citizen of the United States, must apply "to such inferior Courts," in the first instance "as Congress may from time to time ordain and establish."

3d. This is leaving it discretionary with Congress to create such "inferior courts" and placing the personal liberty of the citizen at the disposal or at the discretion of an Act of Congress.

4th. The writ of *habeas corpus*, is not a writ of favor, but a *writ of right;* but it ceases to be a writ of right if the citizen can't demand and receive it from the Supreme Court of the United States.

Kent says (vol. 1, p. 301): "The Judges of the "United States Supreme Court, as well as the Judges of "the District Courts may, by *habeas corpus*, relieve the

"citizens from all manner of unjust imprisonment occur-
"ring under or by color of the authority of the United
"States or for acts done or omitted to be done, in pur-
"suance of a law of the United States, or of a judicial
"authority of Any Court or Judge thereof."

This language is so plain and forcible as to the jurisdiction of the Supreme Court to grant the writ of *habeas corpus* asked for in the case at bar that on this branch of the subject no further points are indeed necessary.

II.

This Court has jurisdiction to grant the writ prayed for where the petitioner is illegally restrained of his liberty by the sentence and judgment of a MILITARY COURT-MARTIAL. The Constitution provides (Section 8, Article 1) that:

"Congress shall have power to make rules for the
"government and regulation of the land and naval
"forces."

In pursuance of this power, so conferred on Congress by the Constitution, the Articles of War, being chapter 5 of the the Revised Statutes, were accordingly enacted. It was under these very Articles of War that the military court martial claim to have had jurisdiction, and the right to try, sentence and condemn the petitioner. A case coming under these Articles of War, enacted in pursuance of the power conferred on Congress, is a case "arising under "the Constitution," within the true meaning and spirit of Section 2, Article 3, Const., to which the "judicial "power of the United States" extends, and which under the previous section of the same article (section 1, article 3) is vested in the Supreme Court.

Again, the second sub-division of Article 6 of the Constitution provides that:

"This Constitution, and the Laws of the United States

"which shall be made in pursuance thereof, * * * shall "be the supreme law of the land."

By whom shall this *supreme law of the land*—to wit, the Articles of War passed in pursuance of the power conferred on Congress—be exercised, interpreted and judicially construed, if not by the Supreme Court? In a case like the present, where the imprisonment is caused by the sentence and judgment of a military court-martial, the Supreme Court has the full power to issue the Writ of Habeas Corpus. It is a case arising under the Constitution, and the power is properly vested in the Supreme Court.

III.

The action of military Court Martials are subject to the civil Courts.

De Lohme on the English Constitution vol. 2. chap. 17, showing Courts martial to be subject to the civil Court says; (see note 5, to this chapter;) "To the above "facts concerning the pre-eminence of the civil over the "military power at large, it is needless to add, that, *all* "*offences* committed by persons of the military in regard to individuals, belonging to other "classes of the people are be determined upon, by the civil Judge &c.

In the case of Wolfe Tone, who was tried and condemned by a military Court Martial on the 10th November, 1798, in the City of Dublin, Ireland, and whose case was brought to the King's Bench by his counsel Mr. Curran, who claimed that no Court Martial could have any cognizance of any crime imputed to him, while the Court of King's Bench sat in the capacity of the first Commercial Court of the land." Every law authority is with me, said Mr. Curran, when I stand upon the sa- "cred and immutable principle of the Constitution' *that* "*martial Law and Civil Law are incompatible*, and "that the former must cease with the existance of the latter.

The LORD CHIEF JUSTICE granted the writ immediately.

In the case of John Merryman, who was held as a prisoner at Fort McHenry, in pursuance of a direction of the President of the United States to the general, then in command of the military department, Chief Justice Taney, the head of the judiciary of the United States, granted the writ of *habeas corpus*. The learned Chief Justice says:

"The great fundamental laws which Congress itself "could not suspend, have been disregarded and sus- "pended like the writ of *habeas corpus*, by a military "order, supported by force of arms. Such is the case, "now before this Court, and I can only say that if the "authority which the Constitution has confided to the "Judiciary Department, and judicial officers, may thus "upon any pretext and under any circumstances be "usurped by the military power at its discretion, the "people of the United States are no longer living under "a government of laws, but every citizen *holds life*, "*liberty and property at the will and pleasure of the* "*army officer in whose military district he may happen* "*to be found.*"

See Pamphlet on Habeas Corpus on Martial Law by Joel Parker, page 7.

The writ of *habeas corpus* may issue to inquire into the cause of detention and imprisonment of a party condemned unlawfully by a military court-martial.

See Wilson *vs.* McKenzie, cited in ex-parte Milligan, 4 Wallace, p. 46; also ex-parte Milligan, 4 Wall, pp. 2 to 142.

In this case, last above cited, the power of the Supreme Court to issue the Writ of Habeas Corpus to inquire into the causes of the detention of the prisoner, Milligan, convicted by a military court martial without jurisdiction or authority, was decided by this Court, and the prisoner was discharged on HABEAS CORPUS.

AGAIN, The Supreme Court has power to issue the Writ of Habeas Corpus where the court martial, either exceeded its jurisdiction or had no jurisdiction whatever.

In the case of Dynes *vs.* Hoover, 2 How, p. 82, the Court says:

"If a Court has no jurisdiction over the *subject mat-*
"*ter of the charge* it has been convened to try, or shall
"inflict a punishment *forbidden by the law*, even though
"its sentence shall be approved by the officers having a
"revisory power of it, CIVIL COURTS may, on an action or
"proceedings by a party aggrieved by it, inquire into the
"want of the Court's jurisdiction, and give them redres."

In the Tweed case (reported in 60 N. Y. Rep., p. 559), Judge Allen writing the opinion of the New York Court of Appeals, and speaking of the Habeas Corpus, says: "This act has always been construed in favor of and "not against the liberty of the subject and the citizen, "and the reading must be the same, whether the benefit "of it is invoked by the purest and best citizen of the "State or the greatest sinner, and the one most worthy "of condign punishment. The law is no respecter of "persons, and suffers no man, be he guilty or innocent, "to be deprived of his liberty, except 'by due process of "law.' * * * It matters not what the general pow-"ers and jurisdiction of a Court may be, *if it act without* "*authority, in the particular case, its judgments and* "*orders are mere nulities, not voidable, but simply void,* "*protecting no one acting under them, and constituting* "*no hindrance to the prosecution of any right.*"

(Elliot vs. Pearsall, 1 Pet., 328;) People ex rel. Tweed vs. Liscombe, 60 N. Y., 568.

Again says the Court: "If the record shows that the "judgment is not merely erroneous, but such as could "not under any circumstances or upon any state of facts, "have been pronounced, the applicant must be dis-"charged on Habeas Corpus."

People vs. Liscombe, 60 N. Y., supra.

IV.

It is urged as a further reason why this Court has jurisdiction to issue the Writ of Habeas Corpus, also the Writ of Certiorari, as prayed for, that no other Court in the United States is competent to issue both these Writs under the peculiar circumstances of this case. The record and proceedings of the court martial are now on file, as alleged in the petition, with the Judge Advocate-General of the U. S. Army within the city of Washington, D. C., and outside the Northern District of New York, in pursuance of Section 1342 of the Revised Statutes, Article 113 of the Articles of War, Chapter 5, while the body and person of the petitioner is within the jurisdiction of the Northern District of New York. The Writ of Habeas Corpus, if granted by the Circuit Court of the Northern District of New York, could reach only the body of the petitioner, but that Court would have no power to issue the *Writ of Certiorari* to the Judge Advocate-General, to direct the production of the proceedings of the court martial, now on file with him, because the Revised Statutes, Section 752, provides that the Court or justices thereof shall issue the Writ within "*their respective jurisdictions.*" Even if the Circuit Court does issue the Writ, herein prayed, to the Judge Advocate-Generrl, it would be entirely without power to express its obedience. *Hence* it becomes absolutely necessary to apply to this High Court, in the present case, whose writs and process will reach both the proceedings of the court martial, as well as the body of the petitioner.

V.

If any doubt existed as to the jurisdiction of this Court to grant the writs as prayed for it is completely removed and set at rest, by the filing of the supplemental petition herein on the prisoner's behalf.

The *Supplimental Petition shows*, that on the 15th of March, 1882, after the sentence and judgment of the Court Martial against the petitioner, an application for a writ of *Habeas Corpus*, on the petitioner's behalf, was duly made to the Hon. Judge Wylie, one of the Judges of the Supreme Court of the District of Columbia. The Supplemental Petition herein filed, shows that it was a petition to the Supreme Dourt, D. C., addressed and prepared in the manner prescribed by law, and containing substantially the same facts set forth in the petition for the writ, now before this Court.

Judge Wylie took this application under advisement, and on the afternoon of the same day, *denied the writ.*

Before any further proceedings could have been taken on behalf of Sargeant Mason, he was removed to Albany, N. Y., on that evening to the Penitentiary, where he is still undergoing imprisonment.

The Supreme Court of the Distict of Columbia, has the same and all the powers and jurisdiction of the Circuit Court of the United States. It is in fact, the Circuit Court of the United States for the District of Columbia.

See Thompson's Analytical Digest of the Laws relating to the District of Columbia, p. p. 334 to 337. Law of March 3d, 1863, Sec. I, 12 Stat. 762.

See Organic Act of District of Columbia, passed February 21st, 1871, also Revised Statutes of U. S., relating to the District of Columbia, Section 760, passed at 43d Congress, 1873-4.

The provisions of the Revised Statutes, allow the Circuit Court of the United States, to be held by *a single judge.* (R. S. sec. 609.)

Conseqnently, the application for a Writ of *Habeas Cobus* to Judge Wylie as stated, and its denial by him was an application to and denial of the Writ, by the Circuit Court of the United States.

The application at the present stage therefore for this great Writ, is regular and fully within the jurisdiction of this Court.

Ex-parte Milligan, 4 Wall., p. 2 to 142.
Ex-parte Yerger, 8 Wall., p. 85.
Ex-parte Lange, 18 Wall., p.

VI.

The United States Supreme Court has full power to issue the Writ of Habeas Corpus, without any qualifications or limitations whatever.

Section 751, R.S. provides: "That the Supreme Court, "and the Circuit and District Courts shall have power to "issue Writs of Habeas Corpus. (See also cases cited "under this Section)."

Section 752 provides that: "The several Justices and "Judges of the said Courts, within their respective "jurisdictions, shall have power to grant Writs of "Habeas Corpus for the purpose of any inquiry into the "cause of restraint of liberty."

The Writ is not allowed for the purpose of *reviewing*, the proceedings of the Court Martial and correcting errors on its part when it had jurisdiction, but rather for the purpose of an inquiry into the cause of the prisoners detention, and if it be found that he is restrained of his liberty in violation of the Constitution and the Laws of the United States, under an illegal and unauthorized commitment, emanating from a tribunal, that had no jurisdiction to try, to convict and imprison the petitioner, then it becomes the duty of this Court on Habeas Corpus, to discharge the prisoner.

VII.

The Military Court Martial had no jurisdiction to try Sergeant Mason for "*an assault with intent to kill.*"

This was the offence charged against Mason, and which it was claimed was a violation of the 62d *Article of War*.

But article 62d must be construed with *Articles* 58 and 59, so as to give effect to all, if possible.

Article 58 covers and includes the offence charged against Mason—assault with intent to kill; but provides it can be tried by a court martial *only in time of war*.

Article 59 covers the charge against Mason *in time of peace*, and provides for a trial by the civil authorities, and that the military authorities shall surrender the accused on demand by the civil authorities.

Article 62 is an *omnibus clause*, intended to provide for all other offences not provided for, and not enumerated in Articles 58 and 59. But "an assault with intent to kill" is specifically recited and provided for in Article 58, so that Article 62d, under which Mason was tried, convicted and sentenced, has no application to this case, and the Military Court Martial, therefore, had no jurisdiction.

To give a military court jurisdiction, the charge and specification must impute *military crime*, and that to be so, the acts specified must be declared unlawful by the Articles of War and triable by a court-martial, *only in time of war*, or be such offences as are "repugnant to "military discipline, and are pointed out by law by the "general regulations of the army and by the customs of "war."

O'Brien's Am. Military Law, p. 248.
De Hart on Courts-Martial, p. 111.

*In this case of Sergeant Mason, Congress has not seen fit to authorize a court-martial to try a soldier for an "assault with intent to kill," when committed in time of peace in a territorial jurisdiction, whose laws provide for the punishment of that crime. No other view can be entertained without depriving some of the Articles of War of their plain meaning and effect.

It is not necessary to discuss, therefore, that Congress might not empower a court-martial to do what this particular court-martial has done. *It is enough to show that Congress has not exercised the power.*

Where the charge itself does not name any crime provided for generally or specifically, by any of the Articles of War, and triable in time of peace, the military court-martial has no jurisdiction.

DeHart on Court Martial, p. 299.
O'Brien's Am. Military Law (Supra.)

VIII.

The Constitution (Art. 6,) provides, that all persons accused of crimes, shall be entittled to a trial by jury. It is also provided that "no one shall be deprived of his liberty without due process of Law" and certainly if the Court martial assumed powers in time of peace, properly and exclusively belonging to the civil authorities, and a military board is substituted for the trial of the accused by his peers, according to the civil code, then both provisions of the constitution, have been openly and fragrantly violated in the person of Sergant Mason and his discharge from duress and further imprisonment must follow accordingly.

The case before the Court for consideration involves one of the most sacred rights of the American citizen, to-wit, his personal liberty; it is the priceless heritage of American freemen transmitted to them by the fathers of the Republic, and guaranteed by that Constitution for which Americans have fought, bled and died. The case at bar has attracted and assumed national importance, and in submitting it to the careful, the upright and conscientious consideration of this Court, I feel that I may well say, in the eloquent and patriotic language of Mr. Justice Miller, (18 Wall p. 178): "There is no more

"sacred duty of a Court than in a case properly before "it, to maintain unimpaired those securities for the "personal rights of the individual, which have received "for ages, the sanction of the Jurist and the Statesman, "and in such cases, *no narrow, or* illiberal construction "should be given to the wards of the fundamental law, "in which they are embodied."

JAMES M. LYDDY,
Counsel for Petitioner.

LYDDY BROTHERS,
Attorneys for Sergeant Mason,
No. 318 Broadway,
New York City.

OFFICE SUPREME COURT U. S.
FILED
APR 24 1882
JAMES H. McKENNEY, CLERK

Supreme Court of the United States.

IN THE MATTER OF THE PETITION OF JOHN ANDERSON MASON FOR WRITS OF HABEAS CORPUS AND CERTIORARI.

Petitioner's Supplemental Brief.

PETITIONER'S SUPPLEMENTAL BRIEF, AND POINTS IN REPLY TO RESPONDENT'S BRIEF.

FIRST POINT.

It is conceded by counsel for the respondent on page 9 of his brief that the petitioner is entitled to a writ of *habeas corpus* on application to the Circuit or District Courts of the United States under section 752 of the Revised Statutes.

The same section (752) also allows the Supreme Court power to issue the writ without any qualifications or limitations. Under the section of the Judiciary Act of 1789 power was given to all the courts of the United States to issue the writ of *habeas corpus* "*in support of their respective jurisdictions*," but under the revision of the statutes this qualification was taken away, and the statute now reads:

"The Supreme Court * * * shall have power to "issue writs of *habeas corpus*."

In the case *ex parte* Jackson, reported in 96 U. S. Reports, (6 Otto,) page 737, this court held it had the power to issue the writ of *habeas corpus in the first instance*. In that case

the prisoner was indicted, tried, and convicted by the Circuit Court of the United States for the Northern District of New York for unlawfully depositing in the mail a circular containing a lottery offering prizes, but claimed that the act of Congress under which he was convicted and imprisoned was unconstitutional. He applied to the court for a writ of *habeas corpus in the first instance*, but this court, after full argument, held the act of Congress constitutional, and denied the application for the writ because no object would be served by issuing the same, but HELD, *It had the power to issue the writ or habeas corpus in the first instance.*

Ex parte Jackson, 96 U. S. Reports, 737.

POINT SECOND.

An application on behalf of the petitioner, for the writ of habeas corpus, was made to Judge Wylie, of the Supreme Court of the District of Columbia, (see supplemental petition,) and denied by that Judge. The petitioner was immediately removed outside the jurisdiction to the Northern District of New York. He had therefore a right to apply without further delay to the Supreme Court for the writ, and this court in any event, apart from the considerations already urged, has the right and power to grant the writ prayed for, to ascertain whether the decision of Judge Wylie of the Supreme Court of the District, denying the writ, was correct or not. The case comes therefore within the rulings of this court laid down as in—

Ex parte Milligan, 4 Wall., 2.
" Yerger, 8 Wall., 85.
" Lange, 18 Wall.
" Jackson, 96 U. S. Rep., 737.

It would be absurd to suppose that a prisoner thus restrained of his liberty should be obliged to apply to the

Circuit or District Court of every jurisdiction into which he may from time to time be sent or removed by the military authorities, for this writ.

After the refusal of the Supreme Court of the District of Columbia to grant the writ on behalf of the petitioner, he had the right to apply to this court, direct, without further delay, under the decisions already cited.

POINT THIRD.

To hold that a person in the army, condemned by a military court-martial either to death or imprisonment, without authority or jurisdiction, and in violation of the acts of Congress and the provisions of the Constitution, cannot, after the DENIAL of his application for a writ of *habeas corpus* by one of the "inferior courts," have a writ of *habeas corpus* from the Supreme Court, is not only a suspension of that writ in violation of the Constitution's express prohibition, but is so monstrous a doctrine to be seriously advanced in this enlightened age, and so dangerous to liberty, that it ought to receive the prompt and emphatic condemnation of this court.

POINT FOURTH.—*Sentence and Imprisonment Illegal and Void.*

The sentence and imprisonment of the petitioner, (even if the court-martial had jurisdiction to try Sergeant Mason) is illegal and void.

Article 97 of the Articles of War provides: "That no person in the military service shall, under the sentence of a court-martial, be punished by confinement in a penitentiary, *unless* the offense of which he may be convicted could by some statute of the United States, or by some statute of the State, Territory, or District in which such offense may be committed, or by the common law, as the same exists in such State, Territory or District, *subject such convict to such imprisonment.*"

The object for which this provision of law was enacted, was to guard against any greater punishment by a Military Court-martial of a prisoner than that prescribed for the same offense if the accused was tried by a Civil Tribunal.

The offense charged against Mason was "an assault with intent to kill," for which the highest limit of punishment prescribed by section 1150 of the Revised Statutes relating to the District of Columbia, passed 1873 and 1874, is eight (8) years in the penitentiary and labor.

In the case at bar, the petitioner received a greater measure of punishment than that warranted by the judgment of the court-martial, the 97th Article of War, and the provision of the statute relating to the District of Columbia already cited. The sentence imposed was as follows:

1st. Was dishonorably discharged from the army.

2nd. Forfeiture of all pay due, &c.

3rd. Imprisonment for eight (8) years, and

4th. To undergo hard labor besides, &c.

Even if the court-martial had jurisdiction to try Mason for the offense of "assault with intent to kill," he could not receive a greater punishment than that which could be awarded against him if tried and convicted by the civil authorities for the same offense.

The petitioner has been discharged from the army, and has forfeited all his pay and allowances due him, but the imprisonment for eight years with hard labor in addition, is in excess of the power and jurisdiction of the court-martial, not warranted by law and the articles of war, and therefore null and void.

The court-martial might (if it had jurisdiction of the offense charged) have imposed the sentence of dismissal from the army with the forfeiture of all pay, or it might have imposed the imprisonment with labor, but it could not impose both on the petitioner.

Dismissal from the army and forfeiture of all pay due him has been adjudged against the petitioner, but the im-

prisonment and labor besides is in excess of jurisdiction to punish or impose, and not only being unwarranted by law, but is contrary to the express provision of the statute cited, and is null and void accordingly.

POINT FIFTH AND LASTLY.—*The imprisonment of Mason in Albany Penitentiary illegal.*

The sentence of the court-martial is, that the petitioner be confined at hard labor in such penitentiary as the "*proper authority*" may direct. The Albany penitentiary was thereafter designated by General Hancock.

This is unauthorized, and contrary to the Revised Statutes.

Section 1344, R. S., relating to military prisons, says:

"There shall be established at Rock Island, in the State of Illinois, a prison for the confinement and reformation of offenders against the rules, regulations, and laws for the Government of the Army of the U. S., *in which shall be securely confined and employed at hard labor, and governed in the manner hereinafter directed, all offenders convicted before a court-martial or military commission in the United States, and sentenced according to law to imprisonment therein.*"

It will be seen, therefore, that the sentence of the court-martial and the designation thereafter by the "proper authority" of the Albany Penitentiary, was wholly unauthorized, and contrary to the express provision of the statute above cited.

The petitioner's imprisonment therefore being in violation of law and the Constitution of the United States, the writs as prayed for should issue, to the end that the prisoner may be discharged from custody.

JAMES M. LYDDY,
Counsel for Petitioner.

LYDDY BROS.,
Attorneys for Petitioner,
No. 318 Broadway, New York City.

United States Supreme Court.

IN THE MATTER OF THE PETITION OF JOHN ANDERSON MASON, FOR WRITS OF HABEAS CORPUS AND CERTIORARI, &c.

BRIEF AND POINTS OF PETITIONER.

This is an application for leave to file the petition of John A. Mason, now undergoing a sentence of imprisonment, with hard labor, for the period of eight years, imposed by a Military Court Martial, held recently in the City of Washington, D. C., on the 10th day of March, 1882, and for an order to show cause why the writs prayed for should not issue.

The motion for leave to file the petition, and for the order to show cause should be granted.

Points.

I.

The United States Supreme Court has full power to issue the *writ of habeas corpus* without any qualifications or limitations whatever.

Section 751, of the Revised Statutes, provides: "That the "Supreme Court, and the Circuit and District Courts, shall "have power to issue *writs of habeas corpus.*" (See section 751 R. S., and cases cited.)

Section 752 provides that: "The several justices and "judges of the said courts, within their respective jurisdic-

"tions, shall have power to grant *writs of habeas corpus* for "the purpose of any inquiry *into the cause of personal liberty.*"

These two sections, (751 and 752,) clearly show that, for any cause where the personal liberty of the citizen is restrained by any tribunal, court or process, the *writ of habeas corpus* shall be allowed by the court, for the purpose of "*an* "*inquiry into the cause of restraint of liberty.*"

R. S., section 752.

The writ is not allowed for the purpose of *reviewing* the proceedings of the Court Martial, but for the purpose of an inquiry into the cause of the prisoner's detention, and if he is restrained of his liberty, in violation of the Constitution and the statutes in such cases, under an illegal and unauthorized process of commitment, emanating from a tribunal that had no jurisdiction to try, to convict, to sentence, and to commit the prisoner; then the petitioner must be set at liberty, and the motion for leave to file the petition for the writ and for the order to show cause why the writs should not issue should be granted.

II.

The *writ of habeas* may issue to inquire into the cause of detention and imprisonment of a party condemned unlawfully by a Military Court Martial.

See Wilson *vs.* McKinze, cited in *ex parte.*

Milligan, 4 Wallace, p. 46.

Also, *ex parte* Milligan, 4 Wall., pp. 2 to 142.

In this case last above-cited, the power of the Supreme Court to issue the writ of *habeas corpus*, to inquire into the cause of the detention of the prisoner convicted by a Military Court Martial, without jurisdiction, was decided by this court, (Judge Davis) rendering the opinion of the circuit, and Judge Wayne, Judge Swayne and Judge Miller concurring.

Again, The Supreme Court has power to issue the writ of *habeas corpus*, where the Court Martial either exceeded its jurisdiction or had no jurisdiction whatever.

In the case of Dynes *vs.* Hoover, 20 Howard, p. 82, the Court says:

"If a court martial *has no jurisdiction over the subject mat-*
"*ter* of the charge it has been convened to try, or shall in-
"flict a punishment *forbidden by the law*, even though its
"sentence shall be approved by the officers having a revisory
"power of it, civil courts may, on an action, or proceeding
"by a party aggrieved by it, inquire into the want of the
"court's jurisdiction, and give him redress." *Also cited* in *ex parte*, Milligan, 4 Wallace p. 46.

III.

The Military Court Martial had no jurisdiction to try Sergeant Mason for "*an assault with intent to kill.*"

This was the offence charged against Mason, and which it was claimed was a violation of the 62d *Article of War*.

But article 62d must be construed with *Articles* 58 and 59, so as to give effect to all, if possible.

Article 58 covers and includes the offence charged against Mason—assault with intent to kill; but provides it can be tried by a court martial *only in time of war*.

Article 59 covers the charge against Mason *in time of peace*, and provides for a trial by the civil authorities, and that the militay authorities shall surrender the accused on demand by the civil authorities.

Article 62 is an *omnibus clause*, intended to provide for all other offences not provided for, and not enumerated in Articles 58 and 59. But "an assault with intent to kill" is specifically recited and provided for in Article 58, so that Article 62d, under which Mason was tried, convicted and sentenced, has no application to his case, and the Military Court Martial, therefore, had no jurisdiction.

IV.

Article VI of the Constitution provides that all persons accused of crimes shall be entitled to a trial by jury. This was denied Mason, and the Court Martial had no jurisdiction to try him.

V.

The sentence of the Court Martial (see Exhibit No. I.) is that he be discharged from the army, and THEN (on being discharged, but not before,) that he undergo imprisonment for eight years in addition.

When Mason *was discharged* by the military authorities from the army by the Court Martial, all jurisdiction of his person was lost by the military authorities, and their power to punish and imprison *after his discharge* was at an end. The imprisonment therefore is utterly void and illegal.

VI.

It is true that the Circuit Court may have the power to issue this writ; but this Court also has the power in the first instance, as a court of both original as well as appellate jurisdiction. It has exercised that power before in the Milligan (Court Martial) case, 4 Wallace, p. 2, and in the Lange case, reported in the 18 Wallace, 163, where it issued the writs, not for the purpose of *reviewing* the courts below, but as an original question, and subject to inquire into the cause of the restraint on the liberty of the subject. The case before the Court is one of great national importance; the question of personal liberty of the citizen is of paramount importance, and rises superior to all other considerations.

To use the eloquent and patriotic words of Mr. Justice Miller, in the Lange case, 18 Wall., p. 178:

" There is no more sacred duty of a court than in a case " properly before it, to maintain unimpaired those securities " for the personal rights of the individual, which have re-

" ceived for ages the sanction of the jurist and the statesman, " and in such cases *no narrow or illegal construction* should " be given to the words of the fundamental law in which " they are embodied."

In such a case as is now presented to the Court, where it is claimed the military authorities never had any jurisdiction and where the sentence and imprisonment of the petitioner is utterly void, the motion to file the petition and for an order to show cause, should be granted.

JAMES M. LYDDY,
Counsel for Petitioner.

LYDDY BROTHERS,
Attorneys for Petitioner,
318 *Broadway, New York City.*